IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No.

REFUGIO ROMAN MARTINEZ,

Petitioner,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, CHICAGO DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 10517

REFUGIO ROMAN MARTINEZ,
Plaintiff-Appellant,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, CHICAGO DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of October (it being the 1st day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-One and of the Independence of the United States of America, the 176th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Monday, October 1, 1951.

Court met pursuant to adjournment.

Present: Honorable William J. Campbell, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Refugio Roman Martinez, *Plaintiff-Appellant,* *vs.* Andrew Jordan, District Director of Immigration and Naturalization, Department of Justice, Chicago District, *Defendant-Appellee.*	Civil Action No. 49 C 1318.

STATEMENT PURSUANT TO RULE 10(b) OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. This suit was commenced by the filing of a complaint on August 25, 1949, seeking court review under Section 10 of the Administrative Procedure Act of the action of the Department of Justice in ordering plaintiff deported to Mexico and in refusing to process his application for naturalization.

2. The parties to the action are Refugio Roman Martinez, plaintiff, and Andrew Jordan, District Director of Immigration and Naturalization, Department of Justice, Chicago, defendant.

3. The pleadings herein have been as follows: Complaint filed August 25, 1949; Amended Complaint filed November 1, 1949; Defendant's Motion to Dismiss Complaint filed November 7, 1949; Amended Motion to Dismiss, filed May 22, 1950; Second Amendment to Motion to Dismiss filed March 3, 1951.

4. A warrant of arrest had been issued administratively against the plaintiff on April 8, 1941 calling for his arrest for purposes of deportation proceedings. Pursuant to said warrant, plaintiff was arrested and released on the posting of bond in the amount of $1000. Plaintiff remained at large on said bond until October 22, 1951.

3 5. The Defendant's Motion to Dismiss Complaint, Amended Motion to Dismiss, and Second Amendment

to Motion to Dismiss, were submitted to Judge William J. Campbell on briefs without oral argument.

6. On October 1, 1951 an order was entered by Judge Campbell dismissing the complaint.

7. On October 22, 1951 plaintiff was taken into custody for immediate deportation.

8. On October 22, 1951, an order was entered by Judge John P. Barnes staying deportation until October 23, 1951 at 11 A.M. and setting hearing on further stay of deportation before Judge Campbell for 10 A.M. on October 23, 1951.

9. On October 23, 1951 plaintiff presented to Judge Campbell a motion for stay of deportation pending final determination of his appeal. All parties were heard in oral argument on said date.

10. On October 23, 1951 an order was entered by Judge Campbell ordering plaintiff's release on $2000 bond and granting stay of deportation for 20 days on condition that notice of appeal be filed by 12 noon on October 24, 1951 and that plaintiff perfect his appeal within said 20 day period.

11. Plaintiff was released from custody on October 23, 1951 on $2000 bond and subject to certain rules governing parole supervision.

12. Notice of appeal was filed by plaintiff at 10 A.M. on October 24, 1951.

Eugene Cotton,
Attorney for Plaintiff-Appellant.

Cotton, Fruchtman & Watt,
141 West Jackson Boulevard,
Chicago 4, Illinois.

4 Endorsed: In the United States District Court • • (Caption—49-C-1318) • • Statement Pursuant to Rule 10(b) of United States Court of Appeals for the Seventh Circuit.

5 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1318) * *

Be It Remembered, that on to-wit, the 25th day of August, 1949, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

* * * * *

16 And afterwards on, to wit, the 1st day of November, 1949 came the Plaintiff by his attorneys and filed in the Clerk's office of said Court his certain Amended Complaint in words and figures following, to wit:

17 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1318) * *

AMENDED COMPLAINT.

I.

Plaintiff brings this action against the defendant pursuant to the provisions of Section 10 of the Administrative Procedure Act, enacted June 11, 1946.

II.

This court has jurisdiction of this action by virtue of Section 10 of the Administrative Procedure Act.

III.

Plaintiff is an emigrant from Mexico and has resided in this country for more than 25 years under circumstances more specifically set forth below.

IV.

Defendant is District Director of Immigration and Naturalization Service of the United States Department of Justice, Chicago District, and is duly authorized in his

official capacity to carry into effect the provisions of the Immigration Act of October 16, 1918, and all amendments thereto in the Chicago District of the State of Illinois, and to execute warrants of deportation.

V.

On August 12, 1949, the Board of Immigration Appeals of the United States Department of Justice, the high-
18 est appellate body in deciding immigration cases, dismissed the plaintiff's appeal on the order of the Assistant Commissioner, finding the plaintiff subject to deportation and ordering him deported to Mexico.

VI.

The defendant is about to issue a warrant of deportation to take the plaintiff into custody and by virtue thereof is about to deport the plaintiff to Mexico.

VII.

Plaintiff entered the United States at Laredo, Texas, on May 1, 1924, at the age of 20, and was admitted by the Immigration and Naturalization Service as an immigrant for permanent residence and his right to remain has never been questioned except as hereinafter set forth.

VIII.

In or about the year 1932 plaintiff joined the Communist Party of the United States of America and remained a member to the best of plaintiff's recollection for a period of four or five months when he voluntarily withdrew from membership in that party. The plaintiff is not, and has not been found to have been within a period of ten years immediately preceding the present time within any of the classes enumerated in the Act of October 14, 1940 (8 U.S.C. § 705).

IX.

On April 8, 1941, there was issued against the plaintiff a warrant for his arrest upon the ground that subsequent to his entry into the United States he became a member of an organization which advocated the overthrow of the government of the United States by force or violence.

X.

At proceedings conducted on January 15, 1947, February 24, 1947, and October 20, 1948, plaintiff was charged with residing in the United States in violation of the Immigration Act of October 16, 1918, as amended by the acts of June 5, 1920, and June 28, 1940, (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 USC 137), hereinafter referred to as the Act, in that he became after entry into the United States:

1. A member of an organization which advocated the overthrow of the government of the United States by force or violence;

2. A member of an organization which distributed printed matter which advocated the overthrow of the government of the United States by force or violence.

XI.

The provisions of the Act, insofar as they are pertinent to the proceedings against the plaintiff, provide as follows:

"Any alien, who at any time, shall be or shall have been a member of one of the following classes shall be excluded from admission into the United States:

* * * * *

(c) aliens who * * * are members of * * * any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *

* * * * *

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government,

or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

(e) Aliens who are members of * * * any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d).

* * * * *

(g) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in sections 101, 102, 105, 108, 109, 113, 115, 116, 132, 136, 138, 139, 142-156, 158-166, 168, 169, 171, 173, 175, 177, and 178 of this title. The provisions of this section shall be applicable to the classes of aliens mentioned therein, irrespective of the time of their entry into the United States. (Act of October 16, 1918, as amended by the Acts of June 5, 1920, and June 28, 1940; 40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 USC 137.)"

XII.

Plaintiff has two children both born in this country. These children, ages 9 and 11, are supported by him. He is employed as a field representative for the United Packinghouse Workers of America, affiliated with the Congress of Industrial Organizations. The United Packinghouse Workers of America has a membership of approximately 150,000. His work in the main is in the Chicago area which is the principal meat-packing center of the country and in which there are approximately 30,000 members of the union. He is known and respected throughout the union as an effective and faithful representative of the workers. He has for many years interested himself in the Mexican community and has been a leader in attempting to bring about improvement in the conditions of the Mexican born.

It was because of his interest in helping Mexican people in Chicago that he joined the Communist Party.

The meetings which he attended in 1932, in the depth of the depression, were concerned primarily with unem-

ployment and relief and he joined that organization because he thought that it might assist Mexicans in getting relief and prevent imposition upon them and particularly upon non-English-speaking Mexicans, by others who were then charging a commission for taking such families to relief stations to obtain sufficient aid.

Plaintiff believes in the American form of government. He is, and has at all times been, since his entry into the United States, as aforesaid, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States and has never believed in nor at any time advocated the overthrow of the government by force or violence, but on the contrary, strongly believes that any changes in our government should be brought about by constitutional procedures.

XIII.

Plaintiff has not been convicted of the commission of any act of violence nor has he been incarcerated as the result of any criminal conviction. Plaintiff is, and has at all times been, since his entry into the United States, as aforesaid, a person of good moral character. Plaintiff registered as an alien in 1940 as required by law.

XIV.

Despite the 24 years that the plaintiff has resided in the United States and despite his record of constructive service in the community and although extended hearings were conducted in his case, the only evidence relied upon by the Immigration and Naturalization Service to sustain the charges lodged against the plaintiff was the fact that he was a member of the Communist Party of the United States of America. In this connection as alleged above the plaintiff admits that he was a member of that party for a period of 4 or 5 months in 1932. The Department of Immigration and Naturalization, however, claims that he was a member from 1931 to 1935. It is thus not disputed that for a period in excess of at least 13 years plaintiff has not been a member of that party.

22 XV.

The only other factual issue in the deportation proceedings brought against the plaintiff besides his admitted past membership in the Communist Party concerns the

character of that party. Plaintiff claims that the Communist Party did not, during the period of his membership, believe in or advocate the overthrow of the government of the United States by force or violence, or distribute literature containing such beliefs or advocacy. The representatives of the Immigration and Naturalization Service introduced documents and verbal evidence which they claimed established otherwise.

XVI.

The record so made in the deportation hearing fails to establish by substantial evidence that the Communist Party of the United States of America in fact believed in or advocated the overthrow of the Government of the United States by force or violence during the membership of the plaintiff, or that the said party distributed literature containing such advocacy.

XVII.

The proceedings against the plaintiff were conducted by the defendant without regard for and in violation of the provisions of the Administrative Procedure Act of 1946 and, in particular, Sections 5, 7 and 8 of that Act.

XVIII.

The entire proceeding to deport the plaintiff and more specifically, the warrant of arrest, the proposed order of the presiding inspector, the decision of the Assistant Commissioner of Immigration and Naturalization Service of the United States Department of Justice, and the order of the Board of Immigration Appeals of the United States Department of Justice and all other activities of the government to achieve the purpose of deporting the plaintiff are unlawful and illegal in that they deprive the plaintiff of his right of freedom of speech, freedom of press,
23 the right peaceably to assemble, and to petition the government for redress of grievances, in violation of the first amendment to the Constitution of the United States, and of his liberty and property without due process of law, in violation of the fifth amendment to the Constitution of the United States, in that:

(a) The Act as written deprives the plaintiff of such rights;

(b) The Act as construed and applied to the plaintiff would authorize the deportation of the plaintiff for membership in or affiliation with an organization which has not been shown to believe in or advocate overthrow of the government of the United States by force or violence;

(c) The plaintiff has been ordered deported for membership in an organization that distributes or has in its possession for distribution proscribed literature without any showing that the plaintiff in any way was connected with such a distribution or that he had knowledge of such literature which advocated, if such be the fact, the overthrow of this government by force or violence.

(d) The Act requires the relinquishment of the right to belong to organizations proscribed by the Act, thereby imposing conditions on the right of an alien to remain in the United States which are in violation of his aforesaid Constitutional rights.

(e) The Act as construed and applied against the plaintiff does not provide a sufficient rule or standard of conduct.

24

XIX.

The warrant for the arrest of the plaintiff was issued and served upon him and he was taken into custody in violation of paragraph 3 of Section 9 of Article I of the Constitution of the United States, which provides that "No Bill of Attainder or ex post facto law shall be passed," in that the amendment of June 28, 1940, to the Act of October 16, 1918, as amended, is an ex post facto law as written and more particularly as it has been construed and applied to the plaintiff, in that the plaintiff was no longer a member of the Communist Party of the United States of America at the time of the enactment of the amendment of June 28, 1940, under and by virtue of which amendment past membership in proscribed organizations is considered to be an independent ground for deportation.

XX.

The arrest of the plaintiff, his detention, restraint and imprisonment, and his proposed deportation denies and deprives the plaintiff of due process of law in violation of the fifth amendment of the Constitution of the United States in that the 1940 amendment to the act of October 16, 1918, as amended, as applied to the plaintiff, who ceased

to be a member of the Communist Party of the United States in 1932, deprives the plaintiff of fundamental rights based upon conduct antedating the 1940 amendment.

XXI.

On January 24, 1949, plaintiff filed with the United States Immigration and Naturalization Service an application for naturalization in the form and manner prescribed by the said United States Immigration and Naturalization Service, which application is still pending. The Respondent and the Naturalization Service and respondent's agents therein have refused and failed to process such application.

25

XXII.

Plaintiff believes that the government is preparing a warrant of deportation and is about to take him into custody, and that if he is suddenly taken into custody and deported he and his family will suffer irreparable injury. It is essential in protecting his rights and the rights of his family that his status as a resident be maintained in status quo until his rights can be adjudicated by this Court under Section 10 of the Administrative Procedure Act, and that his application for naturalization may be acted upon.

Wherefore, plaintiff prays that the Court:

1. Order the United States Immigration and Naturalization Service to file in this Court the petition of plaintiff for naturalization, and that thereupon this Court proceed to hear and determine plaintiff's petition for naturalization.

2. Issue an injunction without notice and without bond restraining the defendant or his agents from arresting the plaintiff pending the determination of this proceeding and of the plaintiff's naturalization application, and allowing the bond heretofore deposited with the defendant at the time the warrant of arrest was served upon the plaintiff to remain in effect during the pendency of this proceeding, in lieu of any other bond;

3. Declare the Act unconstitutional and void as a violation of the first and fifth amendments to the Constitution of the United States;

4. Declare the Act as applied to the plaintiff unconstitutional as a violation of the first, fifth and eighth amendments to the Constitution of the United States and as a

violation of Article I, Section 9, paragraph 3 of the Constitution of the United States.

5. Review all the proceedings had before the Immigration and Naturalization Service of the United States Department of Justice and vacate the order of the Assist-
26 ant Commissioner of Immigration and Naturalization, as affirmed by the Board of Immigration Appeals of the United States Department of Justice and ordering that any further proceedings had with reference to the plaintiff shall be conducted in accordance with the provisions of the Administrative Procedure Act.

6. Grant such other and further relief as the court may believe just and proper.

By: Eugene Cotton,
11 South LaSalle Street,
Chicago 3, Illinois,
Attorney for Plaintiff.

November 1, 1949.

27 State of Illinois, } ss.
County of Cook. }

Refugio Roman Martinez, being first duly sworn on oath, deposes and says that he has read the foregoing amended petition and states that the facts therein set forth are true.

Refugio Roman Martinez.

Subscribed and sworn to before me this 31st day of October, 1949.

Margaret Kandler,
Notary Public.

* * * * *

30 And afterwards on, to wit, the 16th day of May, 1950 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Amended Motion to Dismiss Complaint in words and figures following, to wit:

31 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1318) * *

AMENDED MOTION TO DISMISS COMPLAINT.

Now comes the defendant, Andrew Jordan, District Director of Immigration and Naturalization, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and moves the Court for leave to amend his Motion to Dismiss Complaint as follows:

I. The Complaint fails to state a claim upon which relief can be granted.

(A) The present proceeding was initiated prior to the effective date of the Administrative Procedure Act, and, therefore, is not subject to the requirements of that Act.

(B) A naturalization proceeding is a judicial proceeding subject to all the incidence of a judicial proceeding, and is specifically excepted from the provisions of the Administrative Procedure Act by Section 1001(a) of that Act.

(C) Plaintiff's claim that the Deportation Act is repugnant to the Constitution does not present a substantial constitutional question so as to present a claim upon which relief may be granted.

(D) Petitioner's prayer for an injunction restraining the enforcement, operation and execution of the Immigration laws is based upon a claimed repugnance to the Constitution of the United States, and cannot be heard and determined except by a District Court of three judges.

Otto Kerner, Jr.,
United States Attorney.

32 And afterwards on, to wit, the 30th day of March, 1951 came the Defendant by its attorneys and filed in the Clerk's office of said Court his certain Second Amendment to Motion to Dismiss in words and figures following, to wit:

33 IN THE UNITED STATES CIRCUIT COURT.
* * (Caption—49-C-1318) * *

SECOND AMENDMENT TO MOTION TO DISMISS.

Now comes the defendant Andrew Jordan, District Director of Immigration and Naturalization, and moves the Court to dismiss this action for reasons in addition to those set forth in the Amended Motion to Dismiss Complaint as follows:

I.

The Amended Complaint fails to state a claim upon which relief can be granted.

(E) The Internal Security Act of 1950, Title 8, U. S. C. 729(c) forbids the granting of the relief sought in paragraphs 1 and 2 of the prayer of the Amended Complaint reading:

"1. Order the United States Immigration and Naturalization Service to file in this Court the petition of plaintiff for naturalization, and that thereupon this Court proceed to hear and determine plaintiff's petition for naturalization.

2. Issue an injunction without notice and without bond restraining the defendant or his agents from arresting the plaintiff pending the determination of this proceeding and of the plaintiff's naturalization application, and allowing the bond heretofore deposited with the defendant at the time the warrant of arrest was served upon the plain-
34 tiff to remain in effect during the pendency of this proceeding, in lieu of any other bond."

Otto Kerner, Jr.,
United States Attorney.

35 And afterwards, to wit, on the 1st day of October, 1951, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

36 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1318) * *

MEMORANDUM AND ORDER.

CAMPBELL, *District Judge.*

Plaintiff is an alien who has been found by the Immigration and Naturalization Service to be subject to deportation. In his amended complaint, he asserts that he brings the instant action pursuant to the provisions of Section 10 of the Administrative Procedure Act, enacted June 11, 1946, for the purpose of setting aside the deportation order and processing his petition for naturalization.

Plaintiff was arrested April 24, 1941 on a warrant of arrest issued by the Immigration and Naturalization Service, charging that he is in the United States in violation of the Act of October 16, 1918, as amended (8 U. S. C. A. 137(c) and (g)) in that:

> "after entry he became a member of one of the classes of aliens enumerated in Section I of the said Act, to wit: Aliens who are members of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States."

He was accorded a hearing on October 16, 1946 at which hearing he waived his right to counsel. After the Presiding Inspector's findings of fact, conclusions of law and order were served on him, he engaged counsel who filed a motion to have the case re-opened for the introduction of additional evidence. The motion was granted and the re-opened hearing was held on January 15, 1947 and October 20, 1948. In the re-opened hearing, the additional charge was lodged that the plaintiff is subject to deportation under the Act of October 16, 1918, as amended (8 U. S. C. A. 137(e)), in that

> "After entry he has been a member of the following

class set forth in Section 1 of said Act: An alien who is a member of an organization, association, society or group that writes, circulates, distributes, prints, publishes or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display any written or printed matter advising, advocating or teaching the overthrow by force or violence of the Government of the United States."

37 On March 22, 1949 the Assistant Commissioner of Immigration and Naturalization entered an order directing the plaintiff's deportation to Mexico on the charge in the warrant of arrest and the additional charge lodged during the hearing. The plaintiff appealed to the Board of Immigration Appeals, which Board dismissed his appeal on August 12, 1949. In October, 1949 plaintiff filed his amended complaint in this cause, praying the following relief: (1) Order the Immigration and Naturalization Service to file in this Court the petition for naturalization heretofore filed by plaintiff, and that the Court proceed to hear and determine said petition; (2) Enjoin defendant from arresting plaintiff pending the determination of this proceeding and of plaintiff's naturalization application; (3) Declare the Immigration Act unconstitutional; (4) Declare the Immigration Act as applied to plaintiff unconstitutional; (5) Review all the agency proceedings heretofore held, and order that further proceedings be held in accordance with the provisions of the Administrative Procedure Act.

On November 7, 1949, defendant moved to dismiss the complaint on the ground that Section 10 of the Administrative Procedure Act is not applicable as a basis for review of deportation or exclusion cases under the immigration laws. On May 16, 1950, defendant filed an amended motion to dismiss on the following grounds: (1) The present proceeding was initiated prior to the effective date of the Administrative Procedure Act, and, therefore, is not subject to the requirements of that Act; (2) A naturalization proceeding is a judicial proceeding which is specifically excepted from the provisions of the Administrative Procedure Act by Section 1001(a) of the Act; (3) Plaintiff's claim that the Deportation Act is repugnant to the Constitution does not present a substantial constitutional question; (4) Plaintiff's prayer for an injunction restraining the enforcement,

operation and execution of the immigration laws cannot be heard and determined except by a three-judge court. On March 30, 1951, defendant filed a second amendment to the motion to dismiss on the ground that the Internal Security Act of 1950, 8 U. S. C. A. 729(c) forbids the granting of the relief sought in Paragraphs 1 and 2 of the prayer of the amended complaint.

The complaint must be dismissed. One of the principal grounds asserted by plaintiff for relief is that the Immigration Service, in its hearings, did not observe the requirements of the Administrative Procedure Act insofar as it relates to the guarantees of separation of functions, absence of any responsibility by the presiding officer at a hearing to any officer or employee engaged in investigative or prosecuting functions for the agency, and designation of presiding examiners to assure impartiality on the part of such officers. It is true, as plaintiff asserts, that the United States Supreme Court, in the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 39, held that administrative hearings in deportation cases must conform to these requirements of the Administrative Procedure Act. However, it should be observed that the Sung decision has been rendered ineffective due to the subsequent enactment on September 27, 1950 of Public Law 843, 81st Congress 2d Session, 64 Stat. 1048, which provides: "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007)." Even assuming that the previous hearings had been conducted in violation of the pertinent sections of the Act, the Court would be performing a useless act if it required new hearings, for it is clear that they could, and probably would, be conducted in the same manner as they previously were.

38 In view of plaintiff's admission in his pleadings that he had been a member of the Communist Party in 1932, he cannot be heard to complain that there was no substantial evidence to support the charges made in the agency hearings. Plaintiff further asserts that the 1940 amendment to the Immigration Act, insofar as it relates to deportation of aliens who were members of proscribed organizations prior to the passage of the amendment, constitutes an ex post facto law. This point is not well taken. The constitutional prohibition against ex post facto laws has no application to deportation proceedings for the reason

that an order of deportation is not a punishment for a crime, but rather is simply a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. *Wong Wing* v. *United States*, 163 U. S. 228. Nor does it devolve upon the judicial branch of the government to determine the wisdom or expediency of the action taken by Congress in this regard.

Plaintiff's remaining contention, i. e., that the 1940 amendment to the Immigration Act, in subjecting to deportation aliens who are or have been members of subversive organizations, is repugnant to the First and Fifth Amendments to the Constitution, is similarly untenable. It should be observed that the 1940 amendment is substantially identical with the Smith Act, 18 U. S. C. A. 2385, the constitutionality of which the United States Supreme Court recently upheld in the case of *Dennis* v. *United States*, 341 U. S. 494 (1951). In view of that holding, it follows that no substantial constitutional question has been presented in the case at bar.

Defendant's motion, as amended, to dismiss the complaint is granted, and the same is hereby accordingly dismissed.

Campbell,
Judge.

October 1, 1951.

39 And afterwards, to wit, on the 22nd day of October, 1951, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

40 UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1318) * *

Monday, October 22, 1951.

Present: Honorable John P. Barnes, District Judge.

On motion of the plaintiff by counsel it is

Ordered that deportation of plaintiff, Refugio Roman Martinez, be and it is hereby stayed until 11:00 o'clock, A. M., of October 23, 1951, and it is

Further Ordered that hearing for further stay of deportation be and it is hereby set for October 23, 1951, at 10:00 o'clock, A. M., before the Honorable William J. Campbell, one of the Judges of this Court.

41 And afterwards on, to wit, the 23rd day of October, 1951 came the Plaintiff by his attorneys and filed in the Clerk's office of said Court his certain Motion For Stay Of Deportation Pending Final Disposition Of Review Proceedings, in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1318) * *

MOTION FOR STAY OF DEPORTATION PENDING FINAL DISPOSITION OF REVIEW PROCEEDINGS.

Plaintiff by his attorney respectfully moves this court for an order staying the deportation of plaintiff herein, ordering his release and postponing the effective date of the order of deportation heretofore issued herein until the review proceeding brought by the plaintiff has been finally disposed of on appeal or certiorari, and in support thereof shows to this Court the following:

1. Plaintiff is the subject of an order of deportation

which has been issued by the Immigration and Naturalization Service.

2. Plaintiff has brought in this Court under the provisions of Section 10 of the Administrative Procedure Act an action for the purpose of setting aside the deportation order.

3. On October 1, 1951 the Court entered an order granting the motion of the defendant to dismiss the complaint.

4. The time of plaintiff to appeal from the said order has not expired and it is plaintiff's intention in good faith to take an appeal.

5. Good and probable cause exists for taking such an appeal, as indicated by the fact that on October 3, 1951 the United States Supreme Court granted certiorari to the Court of Appeals for the Second Circuit in the Case of *Harisiades* v. *Shaughnessy*, Docket No. 43, October Term, 1951, which said case involves the identical issues litigated before this Court and to be presented on the appeal herein.

43 6. On October 22, 1951 the defendant herein by certain of his agents and representatives took the plaintiff into custody for the announced purpose of placing plaintiff on an airplane bound for Mexico on the morning of October 23, 1951.

7. On October 22, 1951 Judge John P. Barnes issued an order staying the deportation of plaintiff until 11 A. M. on October 23, 1951 and setting hearing for further stay before this Court at 10 A. M. on the same date.

8. The summary deportation of plaintiff will deprive him of his right to prosecute his appeal herein and will result in irreparable injury.

9. Plaintiff has been free on bond since the commencement of deportation proceedings and down to and including the date of his seizure as hereinabove set forth. Approximately one week ago, plaintiff appeared before the Immigration and Naturalization Service voluntarily at the request of the Service and there voluntarily accepted certain conditions of parole including personal monthly report to the office of defendant, and designation of a reputable citizen as parole supervisor to whom plaintiff is to report weekly. Plaintiff has at all times complied with the conditions of his bond and been available to the process of the defendant. Plaintiff as and for sometime has been owner and operator of an established restaurant located in the City of Chicago.

Wherefore, plaintiff respectfully prays that an order be entered herein staying the defendant, his deputies and all persons concerned in and having custody of the plaintiff directing that plaintiff be released from custody under the bond and supervision effective prior to October 22, 1951 and that all further proceedings to enforce the order of deportation against plaintiff be stayed and that the effective date of said order be postponed until the proceedings for judicial review of the said order of deportation shall have been finally disposed of on appeal or certiorari or until plaintiff's time for taking such appeal or petitioning for certiorari shall have expired without action by plaintiff.

Respectfully submitted,
Eugene Cotton,
Attorney for Plaintiff.

Cotton, Fruchtman & Watt,
141 West Jackson Boulevard,
Chicago 4, Illinois.

And on the same day to wit, on the 23rd day of October, 1951, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1318) * *

ORDER.

The above cause having come on for hearing upon the plaintiff's motion for an order directing the release of plaintiff and the stay of action on deportation order pending final disposition of these proceedings and both parties having appeared and then heard, and the Court having considered the record herein and the motion and the argument of counsel, it is hereby

Ordered:

1. That upon the filing by or on behalf of the plaintiff with respondent of a good and sufficient bond in the amount of $2,000, plaintiff be released from custody subject to the

conditions of supervision which were in effect with respect to said plaintiff prior to October 22, 1951.

2. That enforcement of the order of deportation against the plaintiff pending final disposition of his appeal from the order entered by this Court on October 1, 1951 be and the same hereby is stayed for a period of twenty days from the date hereof, provided that plaintiff files his notice of appeal with the Clerk of this Court by 12 o'clock noon on October 24, 1951 and provided further that plaintiff shall within the said twenty days perfect his appeal by the
46 filing of the record with the clerk of the United States Court of Appeals.

Enter:

Campbell,
Judge.

October 23, 1951.

47 And afterwards on, to wit, the 24th day of October, 1951, 10 A. M. came the Plaintiff-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal and Bond on Appeal in words and figures following, to wit:

48 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Refugio Roman Martinez, *Plaintiff-Appellant,* *vs.* Andrew Jordan, District Director of Immigration and Naturalization, Department of Justice, Chicago District, *Defendant-Respondent.*	Civil Action No. 49-C-1318.

NOTICE OF APPEAL.

Notice is hereby given that Refugio Roman Martinez, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final order of the United States District Court for the Northern District of Illinois; Eastern Division, entered in this cause on October 1, 1951.

Refugio Roman Martinez,
By Eugene Cotton,
His Attorney.

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on October 24, 1951, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to: Otto Kerner, Jr., U. S. District Attorney, U. S. Court House, Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of October, A. D. 1951.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

• • • • •

50 And afterwards on, to wit, the 25th day of October, 1951 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points in words and figures following, to wit:

* * * * *

53 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1318) * *

STATEMENT OF POINTS.

1. The court erred in dismissing the complaint.
2. The court erred in holding that even if the hearings in the agency proceeding were conducted in violation of the pertinent sections of the Administrative Procedures Act, the complaint herein, seeking relief from an order issued as a result of said hearings, must be dismissed.
3. The court erred in holding that the 1940 amendment to the Immigration Act insofar as it relates to deportation of aliens who were members of proscribed organizations prior to the passage of the amendment does not violate the constitutional prohibition against ex post facto legislation.
4. The court erred in holding that the 1940 amendment to the Immigration Act insofar as it relates to deportation of aliens who were members of proscribed organizations prior to the passage of the amendment does not violate the provisions of the First and Fifth Amendments to the United States Constitution.
5. The court erred in failing to deny the defendant's motion to dismiss, amended motion to dismiss and second amendment to motion to dismiss.

54 6. The court erred in failing to hold that the 1940 Amendment to the Immigration Act on its face and as applied to the facts of this case as set forth in the amended complaint violates the provisions of the First Amendment to the United States Constitution.

7. The court erred in failing to hold that the 1940 Amendment to the Immigration Act on its face and as applied to the facts of this case as set forth in the amended complaint violates the provisions of the Fifth Amendment to the United States Constitution.

8. The court erred in holding that the amended complaint fails to present a substantial constitutional question.
9. The court erred in failing to hold that the amended complaint states a claim upon which relief can be granted for failure of the defendant to comply with the provisions of the Administrative Procedure Act.
10. The court erred in failing to hold that the amended complaint states a claim upon which relief can be granted because the 1940 Amendment to the Immigration Act is an ex post facto law in violation of Article I, Section 9, paragraph 3 of the Constitution of the United States.
11. The court erred in failing to hold that the amended complaint states a claim upon which relief can be granted because the 1940 Amendment to the Immigration Act on its face and as applied to plaintiff violates the First and Fifth Amendments to the Constitution of the United States.
12. The court erred in failing to hold that the amended complaint states a claim upon which relief can be
55 granted because of the insufficiency of the evidence to support the Assistant Commissioner's findings.

Eugene Cotton,
Attorney for Plaintiff-Appellant.

Cotton, Fruchtman & Watt,
141 West Jackson Boulevard,
Chicago 4, Illinois.

56 And afterwards on, to wit, the 6th day of November, 1951 came the Appellee by his attorneys and filed in the Clerk's office of said Court his certain Statement of Appellee, in words and figures following, to wit:

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1318) * *

STATEMENT OF APPELLEE FILED PURSUANT TO RULE 10(c) OF RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The appellee herein is Marcus T. Neelly successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service, represented by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, whose address is Room 450, United States Court House, Chicago, Illinois.

Otto Kerner, Jr.,
United States Attorney.

58 United States of America, } ss:
Northern District of Illinois. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of the Appellant filed in this Court in the cause entitled: Refugio Roman Martinez, Plaintiff, *vs.* Andrew Jordan, District Director of Immigration and Naturalization Department of Justice, Chicago District Defendant, No. 49 C 1318, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 6th day of November, 1951.

Roy H. Johnson,
Clerk,

By Gizella Butcher,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed January 2, 1952, in:

Cause No. 10517.

Refugio Roman Martinez,
Plaintiff-Appellant,

vs.

Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1952.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the second day of October, in the year of our Lord one thousand nine hundred and fifty-one, and of our Independence the one hundred seventy-sixth:

Refugio Roman Martinez, *Plaintiff-Appellant,* 10517 *vs.* Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit, on the seventh day of May, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, May 7, 1952.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

Refugio Roman Martinez, *Plaintiff-Appellant,* *vs.* Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10517

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of record and briefs of counsel and on oral argument by Mr. Eugene Cotton, counsel for the appellant, and by Mr. John Peter Lulinski, counsel for the appellee, and the Court takes this matter under advisement.

And afterwards, to-wit, on the twenty-first day of May, 1952, there was filed in the office of the Clerk of this Court the opinion of the Court which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10517. October Term, 1951, April Session, 1952.

Refugio Roman Martinez,
Plaintiff-Appellant,
vs.
Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 21, 1952.

Before MAJOR, *Chief Judge,* DUFFY and LINDLEY, *Circuit Judges.*

MAJOR, *Chief Judge.* Plaintiff by complaint, filed August 25, 1949, sought a review under § 10 of the Administrative Procedure Act (5 U. S. C. § 1009) of an order of the Assistant Commissioner of Immigration and Naturalization, dated March 22, 1949, directing plaintiff's deportation to Mexico. Defendant on numerous grounds moved to dismiss the complaint, which motion was allowed by the District Court, October 1, 1951. From this order of dismissal the appeal comes to this court.

The District Court in a memorandum opinion rendered in connection with its order of dismissal discusses and decides adversely to plaintiff every issue presented by his complaint. Subsequently and on March 10, 1952, the Supreme Court decided the case of *Harisiades* v. *Shaugh-*

nessy, 342 U. S. 580, which not only confirmed the views of the District Court as expressed in its memorandum opinion but which we think is decisive of every issue presented on this appeal.

According to the allegations of the complaint, plaintiff, an immigrant from Mexico, was admitted to this country as a permanent resident on May 1, 1924, at the age of 20 years. He has two children, born in this country, ages 9 and 11, who are supported by him. On April 8, 1941, a warrant for his arrest was issued upon the ground that subsequent to his entry into the United States he became a member of an organization which advocated the overthrow of the Government of the United States by force or violence and, subsequently, he was charged with residing in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Acts of June 5, 1920 and June 28, 1940 (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U. S. C. 137), hereinafter referred to as the Act.

The pertinent provisions of the Act are as follows:

> "Any alien, who at any time, shall be or shall have been a member of one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> "(c) Aliens who * * are members of * * any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * *.
>
> * * * * *
>
> "(g) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in sections 101, 102, 105, 108, 109, 113, 115, 116, 132, 136, 138, 139, 142-156, 158-166, 168, 169, 171, 173, 175, 177, and 178 of this title. The provisions of this section shall be applicable to the classes of aliens mentioned therein, irrespective of the time of their entry into the United States. * *"

Proceedings were conducted before the Immigration and Naturalization Service, commencing January 15, 1947, and an order was entered by the Assistant Commissioner of Immigration and Naturalization, affirmed by the Board of

Immigration Appeals of the United States Department of Justice, directing plaintiff's deportation. As noted, plaintiff seeks a review of such proceedings under § 10 of the Administrative Procedure Act, and the major controversy here as well as in the court below is whether that Act, and particularly § 10, is applicable. In our view, for reasons subsequently shown, there is no occasion under the circumstances presented to consider or decide this issue. More pointedly, it is presently immaterial whether the review provisions of the Administrative Procedure Act are applicable to a deportation proceeding.

Plaintiff in his complaint alleges:

> "In or about the year 1932 plaintiff joined the Communist Party of the United States of America and remained a member to the best of plaintiff's recollection for a period of four or five months when he voluntarily withdrew from membership in that party."

And further:

> "Despite the 24 years that the plaintiff has resided in the United States and despite his record of constructive service in the community and although extended hearings were conducted in his case, the only evidence relied upon by the Immigration and Naturalization Service to sustain the charges lodged against the plaintiff was the fact that he was a member of the Communist Party of the United States of America. In this connection as alleged above the plaintiff admits that he was a member of that party for a period of 4 or 5 months in 1932. The Department of Immigration and Naturalization, however, claims that he was a member from 1931 to 1935. It is thus not disputed that for a period in excess of at least 13 years plaintiff has not been a member of that party."

Thus, it is definitely disclosed by the allegations of the complaint that the order of deportation rests upon the admitted fact that plaintiff subsequent to his entry into the United States was a member of the Communist Party, even though such membership had been terminated prior to the institution of the proceedings under attack, as well as prior to the amendment of the Act of 1940, relied upon as authority for the order.

In the *Harisiades* case, there were two companion cases (Mascitti and Mrs. Coleman), all of whom, like the plaintiff

here, had been long-time alien residents of this country and all of whom had children born in this country. Likewise as here, their admitted past membership in the Communist Party had been severed prior to the proceeding which resulted in the order for their deportations. In our view, every issue raised by plaintiff's complaint was decided adversely to him by the Supreme Court in the *Harisiades* case. Certainly that is so as to all constitutional and legal issues. It is true the court found it unnecessary under the circumstances before it to decide whether a deportation proceeding was subject to review under the Administrative Procedure Act and, as we have noted, we think it unnecessary to decide the question in the instant case.

When this case was heard in the District Court, it could well have been contended that past membership in the Communist Party was not in itself sufficient to justify an order of deportation; in fact, it was so held in *Kessler* v. *Strecker*, 307 U. S. 22, decided in 1939. Obviously, the court in that case had before it the Act as it existed prior to the 1940 amendment. In the *Harisiades* case, the deportation orders rested, as does that of the instant case, upon the Act as amended in 1940. Based upon the 1940 amendment, the Supreme Court in the latter case left no room for doubt but that its holding in the *Kessler* case was no longer the law. In a footnote (page 589), the court observed:

> "When this court, in 1939, held that that Act reached only aliens who were members when the proceedings against them were instituted, *Kessler* v. *Strecker*, 307 U. S. 22, Congress promptly enacted the statute before us, making deportation mandatory for all aliens who at any time past have been members of the proscribed organizations."

And again, the court, in discussing the effect of the 1940 amendment, stated (page 593):

> "In 1939, this Court decided *Kessler* v. *Strecker*, 307 U. S. 22, in which it was held that Congress, in the statute as it then stood, had not clearly expressed an intent that Communist Party membership remained cause for deportation after it ceased. The Court concluded that in the absence of such expression only contemporaneous membership would authorize deportation.
>
> • • • • •

"The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them."

The Supreme Court, in disposing of the contention that the proceedings against the petitioners must be nullified for failure to conform to the requirement of the Administrative Procedure Act, stated (page 583):

"Validity of the hearing procedures is questioned for noncompliance with the Administrative Procedure Act, which we think is here inapplicable.[4]"

It is not entirely clear why the court thought the Administrative Procedure Act "inapplicable," but in our view it was because each of the petitioners admitted past membership in the Communist Party. We so think because there immediately follows the statement, "Admittedly, each of these deportations is authorized and required by the letter, spirit and intention of the statute." It is true the court points out in a footnote that under § 12 of the Administrative Procedure Act, "* * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." Such footnote, as we view it, was merely a suggestion of an additional reason why the Administrative Procedure Act was inapplicable.

Our sole concern as to whether the *Harisiades* case completely disposes adversely to the plaintiff of all the issues raised in the complaint arises from his allegation:

"The record so made in the deportation hearing fails to establish by substantial evidence that the Communist Party of the United States of America in fact believed in or advocated the overthrow of the Government of the United States by force or violence during the membership of the plaintiff, or that the said party distributed literature containing such advocacy."

It is true that in each of the cases there before the court there had been a finding (see page 584) "that the Communist Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence." A study of the opinion, however, is convincing that such finding was not regarded as essential and that membership in the Communist Party brings the alien within the condemnation of the statute. That the court so considered is shown by the first paragraph of the opinion, which states (page 581):

> "The ultimate question in these three cases is whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party which terminated before enactment of the Alien Registration Act, 1940."

In discussing the Act of 1940, the court stated (page 590):

> "This Act was approved by President Roosevelt June 28, 1940, when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security."

And in discussing the congressional purpose, the court stated (page 593):

> "During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences."

In our view, and we so hold, membership in the Communist Party, present or past, is as a matter of law ground

for deportation. The time has passed when it can be successfully contended that proof is required that the Communist Party is or has been an organization which advocates "the overthrow by force or violence of the Government of the United States." It follows that plaintiff's allegation of a lack of substantial evidence on this score is without legal force or effect. In other words, if plaintiff were allowed a review of the administrative procedure and should establish the allegations of his complaint in this respect, it would not nullify the order of deportation. And it follows that the allegations of the complaint are insufficient to call for a review under the Administrative Procedure Act, and this irrespective of whether that Act might otherwise be applicable.

Congress by the Act of 1950 expressly provided for the deportation of "Any alien who was at the time of entering the United States, or has been at any time thereafter, a member" of the Communist Party of the United States. Title 8 U. S. C. § 137, Pars. 1 (c) and (3) (1951 Cumulative Annual Pocket Part). While we do not rest our opinion upon this recent enactment, it is apparent that plaintiff is subject to deportation even though the present order be nullified. Having admitted membership in such party, the constitutionality of the recent Act would be the only attack open to the plaintiff. However, any hope for success in this respect would appear to be a remote possibility in view of the holding of the Supreme Court in the *Harisiades* case relative to the 1940 amendment. At any rate, it certainly would be immune from any contention that it constituted an *ex post facto* law in violation of § 9 of Article I of the Constitution (*Harisiades*, page 594). It follows that success by plaintiff in the instant proceeding would be an empty victory; it could result in nothing more than a postponement of the evil day.

The order of dismissal is

AFFIRMED.

And on the same day, to-wit, on the twenty-first day of May, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, May 21, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

Refugio Roman Martinez, *Plaintiff-Appellant,* *vs.* Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10517

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

And afterwards, to-wit, on the third day of June, 1952, there was filed in the office of the Clerk of this Court, a petition for a rehearing which said petition for rehearing is not copied herein.

And afterwards, to-wit, on the seventh day of June, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Saturday, June 7, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

Refugio Roman Martinez, *Plaintiff-Appellant,* *vs.* Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10517

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

And afterwards, to-wit, on the twelfth day of June, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, June 12, 1952.

Before:

Hon. J. Earl Major, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

Refugio Roman Martinez, ***Plaintiff-Appellant,*** **vs.** **Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service,** ***Defendant-Appellee.***	**Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.**

10517

On motion of counsel for plaintiff-appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for thirty days from June 13, 1952, pursuant to Rule 25 of the Rules of this Court.

And afterwards, to-wit, on the twenty-fifth day of June, 1952, there was filed in the office of the Clerk of this Court, a designation of record which said designation of record is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Refugio Roman Martinez,
Plaintiff-Appellant,
vs.
Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordan, District Director, Chicago District, Immigration and Naturalization Service,
Defendant-Appellee.
} No. 10517.

DESIGNATION OF RECORD.

To the Clerk of the United States Court of Appeals for the Seventh Circuit:

The Clerk will please prepare a certified transcript of the record in this cause to be filed in the Supreme Court of the United States, consisting of the following:

1. The entire printed record in the Court of Appeals.
2. Order taking this cause under advisement entered May 7, 1952.
3. Opinion of this Court filed May 21, 1952.
4. Judgment entered May 21, 1952.
5. Reference to filing petition for rehearing.
6. Order denying petition for rehearing entered June 7, 1952.
7. Order of this Court entered June 12, 1952, staying the mandate thirty days from June 13, 1952.
8. This designation of record.
9. Clerk's certificate.

Eugene Cotten,
Attorney for Plaintiff-Appellant.

Endorsed: Filed June 25, 1952. Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record, filed June 25, 1952, in:

Cause No. 10517.

Refugio Roman Martinez,
Plaintiff-Appellant,

vs.

Marcus T. Neelly, Successor as of July 1, 1951, to Andrew Jordon, District Director, Chicago District, Immigration and Naturalization Service,
Defendant-Appellee,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of June, A. D. 1952.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 218

REFUGIO ROMAN MARTINEZ, Petitioner,

vs.

MARCUS T. NEELLY, Successor as of July 1, 1951, to Andrew Jordan, District Director, Immigration and Naturalization Service

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.